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EXAMINER

CRAWFORD, GENE O

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1 RECORD OF ORAL HEARING
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3 UNITED STATES PATENT AND TRADEMARK OFFICE
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6 BEFORE THE BOARD OF PATENT APPEALS
7 AND INTERFERENCES
8
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10 Ex parte ROBERT C. HOCHTRITT and ANDREW M. CONGER
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13 Appeal 2007-3501
14 Application 10/660,659
15 Technology Center 3600
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19 Oral Hearing Held: June 11, 2008
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23 Before WILLIAM F. PATE, III, JENNIFER D. BAHR, and
24 STEVEN D.A. McCARTHY, Administrative Patent Judges

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26 ON BEHALF OF THE APPELLANT:

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35 The above-entitled matter came on for hearing on June 11, 2008, at the U.S.
36 Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia,
37 before Virginia Johnson, Freestate Reporting, Inc.

PROCEEDINGS

JUDGE PATE: These are a set of hearings under 37 C.F.R. 41.47. We're going to have Docket Calendar Nos. 13 and 14. This is June 11th, 2008, and we're in hearing room B, and the judges are Judge McCarthy, Judge Bahr and Judge Pate, and Judge Pate is presiding. We can go back off the record.

(Off the record)

(On the record)

MS. HALL: Good morning. This is Calendar No. 13, Appeal No. 2007-3501. The attorney is Mr. Andrew Patch.

JUDGE PATE: Okay. Good morning, Mr. Patch.

MR. PATCH: Good morning, Your Honor.

JUDGE PATE: We've taken an opportunity to familiarize ourselves with this case, and so we're ready to hear your argument.

MR. PATCH: Thank you.

JUDGE PATE: You might introduce your guests.

MR. PATCH: I'd like to very much. With Your Honor's permission, I have two observers with me today, Liam McDowell who is a patent attorney --

COURT REPORTER: I'm sorry. Can you speak up?

MR. PATCH: Sure. With Your Honor's permission, I have two observers with me today, Liam McDowell, who is a patent attorney with my firm and working on cases for the same assignee as this application, and my daughter Pam Patch, who is a college student and working in my office this summer to gauge her interest in the IP field -- she's taking --

1 JUDGE PATE: Okay. Thank you. We're, we're glad to have you
2 both. Sitting in the room are two of our Patent Office externs. They'll be
3 attending the hearing with us.

4 As I said, we have had a chance to familiarize ourselves with your
5 application so you -- we're ready to hear your argument.

6 MR. PATCH: Thank you, Your Honor. Like the Board is aware, we
7 have essentially two issues before you for decision, an indefiniteness
8 rejection and a prior art rejection. In fact, there are several prior art
9 rejections, but because we have not separately argued any of the dependent
10 claims with respect to the prior art rejection, the only one presented to the
11 Board for a decision is the basic obviousness rejection that's applicable to
12 the independent claim.

13 Unless Your Honors would prefer that I proceed in a different order,
14 I'll, I'll address the indefiniteness rejection first, okay. There the question, of
15 course, is whether our claims are sufficiently clear in reciting the relative
16 angles formed by the two sections of the dispenser body -- horizontal. The
17 Examiner I believe has applied the indefiniteness rejection only to those
18 dependent claims that the recite the numerical ranges for the information --
19 of the dispenser body sections, but of course, it, it goes back to ultimately
20 whether the language of the independent claim one is sufficiently clear on
21 that point. We think it is, especially when that claim is read in light of the
22 specification. We think it's clear that when we speak of the upper and longer
23 straight section of the dispenser as being more nearly vertical, it's
24 sufficiently clearly implied that we're saying more nearly vertical than the
25 lower section, and likewise when we refer to the lower section being more
26 nearly horizontal as corollary, it's sufficiently clearly implied that we are

1 speaking of it as being more nearly horizontal than the upper section. And
2 to the extent that there were any possibilities for ambiguity on that point,
3 that's clearly resolved by the passage that we cited in the specification which
4 says explicitly that the angle formed by the upper section is more nearly
5 vertical than the angle formed by the lower section.

6 -- of course that an examiner is entitled to give a claim its broadest
7 reasonable interpretation during examination, because we would have the
8 opportunity to amend. We think that the claim as written is sufficiently clear
9 for the reasons that are stated. I think that the dependent claims, which are
10 actually technically the subject of the rejection, underscore that point,
11 because based on the Examiner's interpretation, those dependent claims
12 would be inconsistent with the independent claim. We think that's an
13 additional reason that -- in favor of finding that the language that -- the claim
14 on this point is sufficiently clear. We have the upper section with which --
15 well -- the lower section could -- has an angular range from I believe it's 15
16 to 60. So obviously it could be more nearly vertical in an absolute sense, but
17 in any event, if it were 60, then the upper section angle would have to be
18 more than 60 based on the language that we --.

19 So again, I believe that that point is sufficiently clear when the claim
20 is read on its own but all the more so when the claim is read in the light of
21 the specification and even still further all the more so when the claims are
22 read as a set and read together. I think that's a sufficient discussion of that
23 issue unless Your Honors have any questions on that.

24 JUDGE PATE: No, go ahead -- the obviousness.

25 MR. PATCH: Okay. The obviousness rejection in its basic form is, is
26 based on the proposed combination of two references, Petterson patent and

1 the Swift patent, and the Examiner's position is that Petterson describes a
2 dispenser with an angled body, although the Examiner perceives that it does
3 not include two straight sections that are angled relative to one another and
4 each angled relative to the horizontal.

5 The secondary reference to Swift is relied upon for showing a
6 dispenser with two straight sections that are angled relative to one another,
7 and the Examiner proposes to combine those two references saying that it
8 would have been obvious to modify Petterson via Swift in order to produce
9 -- in a way that would have produced what we have recited in claim one.

10 However, we don't believe that based on the teaching of those two
11 references and absent core knowledge of the invention that you get to claim
12 one from these two references for a number of reasons. Obviously -- well,
13 not obviously, but we'll just say as a first point that in Petterson we really do
14 not view this as being fairly characterized as an angled dispenser body in the
15 first instance. Rather, Petterson is describing a dispenser body which is
16 continuously curved about a radius of curvature, and that's done for a special
17 reason, and that is the nature of the paper napkins that are going to be
18 dispensed from the Petterson dispenser. In page 4 of Petterson, they show a
19 stack of napkins just by itself without a surrounding dispenser. And the
20 particular type of napkin, I'll relate the industry term as "off fold," but it's
21 folded in such a way that when you make a stack of the napkins, the
22 tendency is for the stack not to be straight but rather have this natural curve.
23 This would be the unstressed repose of a stack of these napkins, and that's
24 why the dispenser body in Petterson is shaped as it is, just to follow the
25 curve of the napkins that are intended to be dispensed from that dispenser.

1 Looking at Swift, it has a straight vertical section and an angled
2 section at the bottom. In Swift, of course, we're looking at what they call a
3 cabinet. It's a dispenser for, for paper cups, and again the shape of the Swift
4 dispenser is designed for reasons that are specific to the paper cups that are
5 being dispensed from it. You can see in the cross-section view of fig. 2 in
6 Swift I think shows it best that this upper section is actually shallower than
7 the diameter of the cups to be dispensed so that when the cups are loaded in
8 the dispenser, they're forced to assume this diagonal angle which is
9 perpendicular to the, to the axis of the lower section but oblique relative to
10 the upper section.

11 If a person skilled in the art were to view these two references
12 together, they -- I haven't argued nonanalogous art as such. That's always a
13 somewhat difficult and problematic argument to make. They're both
14 dispensers, but obviously they're dispensers for significantly different
15 classes of article. So there is some question I think as to whether a person
16 skilled in the art would be likely to view the references together in the first
17 instance. But let's assume that he did and had these two references before
18 him. We just don't see how the structure that we recited in our independent
19 claim really would have been suggested. If you have Petterson, you don't
20 see any apparent modification -- Swift that would address any issue that a
21 skilled artisan would be likely to see looking at Petterson alone.

22 You can hypothesize beyond that and I think beyond further bounds
23 of what, what the case that the Examiner has made and said, what if you
24 wanted to dispense another type of napkin from Petterson. Well, I think
25 probably you wouldn't use Petterson at all. You'd just use some other type

1 of dispenser which is adapted for dispensing napkins that don't have the
2 particular characteristics of those that are described by Petterson.

3 If for some reason you wanted to use this Swift dispenser for napkins,
4 you presumably could do so, but I don't see where the suggestion would
5 arise to incline the body of the Swift dispenser to form this compound,
6 oblique angle that we recited in our independent claim. In neither reference
7 do you have a teaching of an upper straight section of a dispenser which is at
8 an angle relative to the horizontal. So I believe it's problematic to forge a
9 combination of the two references that would result in the creation of a
10 structural feature that is not -- and, and ultimately I think that militates in
11 favor of reversing this prior art rejection.

12 As Your Honor noted, you're familiar with the briefs and, and I don't
13 know that there's much more that would aid your decision than what I've
14 said already. Beyond that, I would be happy to answer any questions that
15 Your Honors would have.

16 JUDGE PATE: Okay, thank you. Judge McCarthy? Judge Bahr?

17 I have no further questions either, so the Board will take this case
18 under advisement. Thank you for your presentation.

19 MR. PATCH: Thank you, Your Honors.

20 (Whereupon, the hearing concluded.)